91-1333

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

CHARISSE MCGEE,

PLAINTIFF-PETITIONER

V.

INTERINSURANCE EXCHANGE OF AUTO CLUB OF SOUTHERN CALIFORNIA,

DEFENDANTS-RESPONDENT

_____)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE COURT OF APPEAL

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ISSUES

1. WAS PLAINTIFF DEPRIVED OF HER CONSITUTIONAL RIGHT TO A JURY TRIAL BY THE IMPOSITION OF "DOOMSDAY" SANCTIONS, WHICH PROHIBITED HER FROM PRESENTING EVIDENCE, EXHIBITS, PLEADINGS, WITNESSES, OR JURY INSTRUCTIONS?

2. ARE THE LOS ANGELES COUNTY "FAST TRACK" RULES ENACTED TO IMPLEMENT THE TRIAL COURT DELAY REDUCTION ACT OF 1986, GOVERNMENT CODE SEC. 68600 ET SEQ., [ENABLING C.C.P. SEC. 575.1] UNCONSTITUTIONAL?

a. ARE THE FAST TRACK RULES UNCONSTITUTIONAL BECAUSE THEY VIOLATE THE RIGHT TO A JURY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT?

3. DOES THE IMPOSTION BY THE CALIFORNIA COURTS OF "DOOMSDAY"

SANCTIONS VIOLATE THE CONSTITUTIONAL RIGHT NOT TO BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS?

4. WAS IT A VIOLATION OF EQUAL PROTECTION AND DUE PROCESS TO SANCTION AND DISMISS PLAINTIFF'S ENTIRE CASE FOR THE PURPORTED MISTAKE OF HER ATTORNEY, OF WHICH SHE HAD NO KNOWLEDGE OR PART?

5. DID RES JUDICATA APPLY TO ISSUES HELD TO BE IN DISPUTE BY THE LAW AND MOTION JUDGE, ISSUES NEVER CONSIDERED BY ANY COURT OF APPEALS, I.E., "CONTRACT OF ADHESION", BAD FAITH, BREACH OF CONTRACT, ETC.?

a. WAS IT "FRIVOLOUS" OR "UNREASONABLE" FOR PLAINTIFF TO APPEAL DISMISSAL OF THESE ISSUES BY THE TRIAL COURT, ISSUES NEVER BEFORE APPEALED?

6. DID THE COURT OF APPEALS ERR BY FINING PLAINTIFF-APPELLANT $1,000 FOR PRESENTING A "FRIVOLOUS" APPEAL WHEN THE SUPERIOR COURT DENIED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND HELD THAT PLAINTIFF HAD BEEN HARMED BY THE ACTIONS OF THE DEFENDANT-INSURER, AND THAT THERE WERE MULTIPLE TRIABLE ISSUES IN DISPUTE?

7. WAS PLAINTIFF WRONGFULLY DEPRIVED OF HER CONSTITUTIONAL RIGHT TO A TRIAL ON THE MERITS BY A "TRIAL" AT WHICH SHE WAS PREVENTED FROM PRESENTING WITNESES, PLEADINGS, EXHIBITS, OR JURY INSTRUCTIONS?

8. WAS PLAINTIFF DEPRIVED OF HER CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT AT THE "TRIAL" GRANTED COSTS TO DEFENDANT AS A "WINNER", WHEN PLAINTIFF WAS NOT ALLOWED TO PRESENT WITNESSES, EXHIBITS, PLEADINGS, OR JURY INSTRUCTIONS

TO PROVE HER CASE AND WAS PREVENTED FROM WINNING?

c. WAS PLAINTIFF WRONGFULLY DEPRIVED OF PROPERTY WITHOUT CONSTITUTIONAL DUE PROCESS BY THE ORDER OF THE "TRIAL" COURT, GRANTING "COSTS" TO DEFENDANT?

9. WAS IT "FRIVOLOUS" OR "UNREASONABLE" FOR PLAINTIFF TO APPEAL WHEN VITAL AND MATERIAL ISSUES, "CONTRACT OF ADHESION", BREACH OF CONTRACT, BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING, DISMISSED BY THE TRIAL COURT, HAD NEVER BEEN RULED ON BEFORE BY ANY COURT OF APPEAL?

9. WAS IT A VIOLATION OF PLAINTIFF'S DUE PROCESS RIGHTS FOR THE COURT OF APPEALS TO FINE PLAINTIFF WHEN THE ONLY PRIOR NOTICE OF "FINE" WAS A LETTER SENT BY THE COURT OF APPEAL LESS THAN A WEEK PRIOR TO THE HEARING, AND NO

AMOUNT OR SUPPORTING DOCUMENTATION FROM DEFENDANT WAS INCLUDED AND NO GROUNDS FOR THE SANCTION WERE SET FORTH?

10. WAS IT ERROR FOR THE COURT OF APPEALS TO SANCTION PLAINTIFF FOR THE COSTS OF THE INSURER WHO SUED HER, ITS INSURED, [IN A DECLARATORY RELIEF ACTION], AN INNOCENT VICTIM OF AN AUTO ACCIDENT, WHO HAD DONE NO WRONG TO THE INSURER?

11. DO THE DOOMSDAY SANCTIONS IMPOSED HEREIN DISCRIMINATE UNFAIRLY AGAINST SOLE PRACTITIONERS [PLAINITIFF' COUNSEL] IN FAVOR OF LARGE LAWFIRMS?

12. DID THE COURT OF APPEALS CONFIRM CONSTITUTIONAL VIOLATIONS OF PLAINTIFF'S RIGHTS AT THE "TRIAL" BY RULING THAT SAID VIOLATIONS DID NOT MATTER BECAUSE PLAINTIFF WAS NOT ENTITLED TO A TRIAL ANYWAY?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE COURT OF APPEAL

PETITIONER HEREBY PETITIONS that a Writ of Certiorari be issued to review

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*GILBERT, KELLY, CROWLEY & JENNETT, 1200 Wilshire Blvd., 6th Floor, L.A., CA 90017 (213) 580-7000, Attorneys of Record.

the Order of the Supreme Court of the State of California, S022741, filed November 13, 1991, which upheld the denial by the Court of Appeal For the Second Appellate District, dated July 24, 1991, B048712, of Petitioner's appeal from a judgment on the pleadings entered against Petitioner, plaintiff, in the Superior Court of Los Angeles County, and Trial Order, Case No. C 536820.

OPINIONS BELOW:

The Order of the Court of Appeal is App. A, attached hereto. The Order of the Superior Court is App. C, attached hereto. The Order of the Superior Court, dated D, is attached hereto. The Order of the California Supreme Court denying Review is App. B attached hereto.

JURISDICTION:

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTES INVOLVED:

The Fourteenth Amendment to the United States Constitution, and the California Trial Court Delay Red ction Act of 1986, Goverment Code sec. 68600 et seq., C.C.P. Sec. 575.1.

STATEMENT OF THE CASE:

Petitioner Charisse McGee is a state-licensed cosmotologist, graduated from Pasadena City College in 1984, andpresently unemployed. She was insured by a policy of auto insurance with the Respondent Insurer herein. Her policy was part of a family policy taken out by her mother, June McGee, in 1983. June McGee is Petitioner's lawyer.

In 1973, when Charissse was 12 years old, her mother signed a waiver of uninsured motorist coverage. She was not told, and the policy did not state, that the waiver would extend indefinitely. At no time for ten following years did the

Insurer ask for a renewal of the waiver or mention it when the policy came up for reconsideratin or renewal.

Subsequently Charisse became of legal age, and using her own earnings, purchased a used 1966 Mustang for herself and insured it under the family policy, K739748, paying for the premiums with her own money. The Insurer knew that Petitioner was insuring her own personally owned vehicle, but it did not ask her for a waiver of uninsured motorist coverage, nor did it notify her that she was subject to such a waiver, signed years ago by her mother when Charisse was 12 years old.

In 1977, June McGee graduated from law school and asked for an entirely new policy: inter alia, she greatly increased the coverage, from the minimum, $10,000, up to $100,000/$300,000, and changed the risk in every way. She also

asked that uninsured motorist coverage be restored. This all was accomplished on the phone with her agent, and unknown to her, the uninsured motorist coverage was not added to the policy declaration. Instead of adding such coverage as requested, the Insurer held onto the old 1973 waiver. The large increase in the premium due to the increased liability coverage obscured the fact that the new premium did not cover uninsured motorist.

Then, on March 1, 1983, near midnight, in the desert outside Thousand Palms, in Riverside County, Charisse McGee and her friend, Byron Pedersen, were involved in an accident, wherein he was driving, and she was the passenger in her own car. On a dark road, totally unmarked and without any notice of curve or lighting, Pedersen failed to negotiate a sudden curve and "straightened out the road", striking a tree stump by the side

of the road. The car turned over several times and was totally destroyed. Charisse was thrown out through the windshield, suffering serious and permanent injuries, particularly to her right foot. Residual pain from this injury means that she may not be able to continue her career as a cosmotologist. Pedersen, the driver, incurred minor injuries: a broken nose, abrasions, bruises, etc. He was not thrown from the car.

Charisse then sued the County of Riverside for failing to provide adequate lighting, signing, or any notice of the sudden curve, McGee v. County of Riverside, Indio case number 158917. The County cross-claimed against Pedersen for indemnity. Pedersen, who was totally uninsured, promised to pay Charisse for the loss of her car. When he failed to make a single payment, she sued him.

Both cases were consolidated in the Indio Court.

At this point Insurer, Respondent herein, dropped Charisse's insurance coverage from the family policy on the grounds that she was driving her car at the time of the accident, in spite of all the evidence to the contrary, including Pedersen's admission at his deposition. It also told her she had no coverage under her policy because of the "resident relative" clause, and it stated that there was no uninsured motorist coverage.

It denied that June McGee had asked for said coverage years prior, and insisted that not only was the old 1973 waiver still in effect, but that it applied to Charisse McGee's car and policy. [Charisse McGee is the legal owner of her own car.] In addition, the insurer refused to provide Charisse McGee with any legal representation or support

in her claim against the County of Riverside, but under a "reservation of rights", the insurer provided Pedersen, who was totally uninsured except derivatively through Charisse's policy, with two law firms, David Silverton, Esq., to to defend him against the County of Riverside, and another law firm to defend him against the suit of Petitioner Charisse McGee. Thus on the basis of her policy, over 20 years of premiums paid by the family to the insurer and no prior major claims ever made, the insurer provide Pedersen, the uninsured driver that Petitioner is suing for negligence, with two law firms to defeat her case, while she, the primary insured, received no assistance from her Insurer whatsoever.

The insurer did this purportedly under a "reservation of rights", claiming that pursuant to the "resident relative" exclusion in her policy, it had no liability whatsoever for her damages if proven to be the driver's fault. The lawfirm provided by the Insurer for Pedersen then tried to have petitioner's entire case dropped, not just her case against Pedersen but also her case against the County of Riverside.

Petitioner complained to the Insurer and asked that it cease providing two law firms to Pedersen, at the expense of her policy, to defeat her case while she, the primary insured, received no legal help of any kind from her own insurer.

This was a gratuitous application of a statute, the "resident relative" exemption, that went way beyond the intent of the framers, not only failing to pay for plaintiff's injuries, but

actually harming her P.I. case against third parties. Especially since plaintiff is not a relative of Pedersen's and did not reside with him.

These actions, terribly costly and harmful to plaintiff, were the basis of the instant lawsuit and the substance of plaintiff's claim that the "resident relative" exception is unconstitutional per se, or the manner in which the insurer applied it was a violation of plaintiff's constitutional rights to equal protection. If petitioner had been a "hitchhiker" picked up off the street by Pedersen while driving plaintiff's car, the insurer would have been liable for damages caused by his negligence.

Respondent insurer maintained it had a duty to defend Pedersen, no matter how detrimental to plaintiff its primary insured. Plaintiff did not object to its legal defense of Pedersen as against the

County of Riverside, but did object to its legal attacks on her entire P.I. case, litigation harming her, paid for by her own insurance policy.

The Insurer's motion to have plaintiff's case dismissed was denied, but the additional litigation was very damaging to plaintiff. The matter went to the State Court of Appeals, Fourth Appellate District, in San Bernardino, No. E 2161. Plaintiff maintained the insurer had no duty to defend Pedersen in this manner at the expense of her policy, and that furthermore the insurer was in a conflict of interest with the driver Pedersen. The Fourth District upheld the insurer's claim that it had a duty to defend Pedersen.

Then on November 7, 1985, defendant Insurer filed a new and separate lawsuit against petitioner, her mother, and Pedersen for Declaratory Relief, once

again forcing her, its primary insured, into more costly time-consuming litigation, litigation never contemplated by petitioner when she purchased a policy of auto insurance.

The insurer sought a declaration that it was not liable for plaintiff's injury so as to avoid paying plaintiff anything if she prevailed against Pedersen. It based its lack of liability on the "resident relative" exclusion and the old (1973) waiver of uninsured motorist. After all the expense and trouble it put petitioner to by its providing Pedersen with two lawfirms in the Indio case, said insurer sought a declaration that it had no duty to defend Pedersen. This was exactly the opposite of the position defendant insurer took in the Fourth District Court of Appeals in Riverside.

Pedersen was later held liable for negligently harming plaintiff in the P.I.

case, and the insurer which provided for his defense refused to pay plaintiff's judgment against him for $4,500. [The County of Riverside settled before trial.]

Petitioner maintains she would be better off if she had no insurance. She received no benefit when she needed it most, and the insurer tried to destroy her P.I. case in Indio and then sued her in the declaratory relief case, causing her further extensive litigation expenses.

On March 1, 1985, plaintiff filed the instant case against the insurer, suing for violation of the covenant of good faith and fair dealing, breach of contract, violation of civil rights, breach of fiduciary duties, breach of statutory duty, declaration of rights under the policy [constitutional violations of due process and equal

protection] and damages.

Later, after the insurer again provided Pedersen with legal counsel in its declaratory relief case and refused to provide plaintiff with such defense, plaintiff amended her complaint to add a cause of action for breach of duty to defend.

It should be noted that on February 14, 1986, plaintiff moved for consolidation of the two cases, plaintiff's for bad faith, and the insurer's for declaratory relief, C 536820 and C 573830. Defendant insurer vigorously opposed the motion, declaring that they involved separate issues and should be considered separately, and it was denied on June 30, 1986.

In further bad faith, the law firm provided by the insurer filed an answer for Pedersen to the insurer's declaratory relief case, but then quit and filed

nothing on his behalf in opposition to the insurer's motion for summary judgment. The Superior Court on this basis, granted summary judgment to the insurer, ruling that it had no duty to defend Pedersen, and therefore, no duty to defend plaintiff. C.T. p. 1165.

Said Court in the declaratory relief case, also upheld the insurer's position on two other issues: (1) the constitutionality of the "resident relative" exclusion and (2) the validity of the ten-year old waiver of uninsured motorist, applied to plaintiff, 12 years old when it was signed, who had no knowledge or notice of its existence.

The court admitted there was a disputed fact as to whether or not plaintiff's mother reinstated uninsured motorist coverage after graduation from law school but did not grant plaintiff leave to amend to provide missing details

of reinstatement.

Plaintiff Charisse McGee alone appealed the summary judgment granted defendant in its declaratory relief case. On March 30, 1989, in an unpublished opinion, Division One of the Court of Appeals affirmed it. Said Court also ruled that defendant had no duty to defend Pedersen. The Order did not mention the fact that the Fourth District Court of Appeals had ruled exactly the opposite, and that the insurer had violated the order of the Fourth District by dropping the legal defense of Pedersen in the Declaratory Relief case. R.T. p. 1165.

On March 30, 1989, the same day Divison One issued its opinion in the Declaratory relief case, the Superior Court, the Honorable David Yaffe, in the instant case, denied the insurer's motion for summary judgment, but upheld the

constitutionality of the "resident relative" exclusion. The insurer did not appeal the denial, and on November 2, 1989, the instant case was set for jury trial on January 2, 1990.

DOOMSDAY ORDER ISSUED: On December 27, 1989, the trial court issued a "doomsday" order against both parties. Plaintiff's counsel, her mother, a sole practitioner, had been involved in a four week civil rights case in the federal court and could not get together with the insurer's attorney to prepare exhibits lists and jury instructions prior to the Issues Conference. The insurer did not respond to plaintiff's phone calls to stipulate to a continuance. The Court then issued an order stating:

"Neither party filed or exchanged witness lists or exchanged exhibit lists or jury instructions--therefore

neither side to be permitted to introduce exhibits,

witnesses nor jury instructions."

Plaintiff petitioned the Court of Appeals for a writ of mandate to vacate that order. On January 31, 1990, the petition was denied.

On February 16, 1990, the case went to "trial". The trial court, the Honorable Warren Deering, now retired, denied plaintiff's motion to set aside the "doomsday" order. At the "trial" the Court refused to panel a jury though plaintiff had requested one and paid for it, and it was affirmed by the Issues Conference.

Although plaintiff was not permitted to present any evidence to prove her case, witnesses, exhibits, etc., including "pleadings", defendant was allowed to move for judgment on the

pleadings and the Court granted it, dismissing plaintiff's case.

Although the "doomsday" order purportedly sanctioned both parties, in effect, because the burden of proof was upon plaintiff, the "doomsday" order gave the case to defendant, who won without having to defend or answer the claims of plaintiff. Further, the trial court granted "costs" to defendant as a winner, while preventing plaintiff from presenting any evidence to prove her case.

Plaintiff then appealed the decision of the trial court dismissing her case, on the grounds that the trial court erred in applying res judicata based on summary judgment granted in the declaratory relief case, affirmed by the First Division.

Plaintiff appealed on the following issues: (1) the issues in plaintiff's

instant case were not included in the declaratory relief case and not considered by the First Division; (2) plaintiff's constitutional rights were violated by the manner in which the "resident relative" exclusion was applied in the P.I. case, i.e., the insurer provided legal defense to Pedersen who tried to have plaintiff's entire case dismissed, but when plaintiff won the case against Pedersen, the insurer refused to pay the judgment; (3)Judge Yaffe denied summary judgment to defendant in the instant case, held that plaintiff had been damaged by the actions of the insurer, and that said actions were unjustified because the insurer had no exposure and hence no reason to interfer in the P.I. case; Judge Yaffe's order had never been appealed by the insurer; (4) the order of the First District was in conflict with the Order

of the Fourth District Court of Appeal regarding the insurer's duty to defend and the defendant violated the order of the Fourth District; (5) "doomsday" sanctions unfairly discriminated against plaintiff and rewarded defendant for the same conduct; (6) "doomsday" sanctions, preventing plaintiff from presenting any evidence or jury instructions, violated her constitutional right to a jury trial; (7) "doomday" sanctions unfairly discriminate against sole practitioners and favor large lawfirms; (8) the insurance policy was a contract of adhesion, an important issue not considered by the First Division; (9) granting "costs" to defendant, who was subject to the same sanction, while preventing plaintiff from presenting her case was a taking of plaintiff's property without due process.

By order of July 24, 1991, the Court

of Appeals, Fourth Division, denied the appeal, and went further, granting sanctions of $1,000 against plaintiff for making a "frivolous" appeal. At the appeals' hearing the Court asked the defendant's attorney if he had any documentation or support for sanctions. He replied that he had none and did now know how much to ask. The Appeals Court then insisted he make a "guess" and accepted his "guess" of $1,000.

On August 5, 1991, Plaintiff moved for rehearing which was denied on August 8, 1991.

I

THE COURT OF APPEALS AND THE CALIFORNIA SUPREME COURT HAVE DISMISSED PLAINTIFF'S CASE WITH VALID UNTRIED CAUSES OF ACTION AGAINST THE DEFENDANT INSURER BY WRONGFULLY APPLYING RES JUDICATA TO HER CASE, USING THE JUDGMENT FOR DEFENDANT IN A DIFFERENT CASE INITIATED BY THE INSURER, WHICH DID NOT INCLUDE ALL THE SAME ISSUES, SUCH AS BREACH OF THE COVENENT OF GOOD FAITH AND FAIR DEALING.

A. What has happened here is that plaintiff filed a "bad faith" complaint against the defendant insurer [the instant case], who then filed a complaint against plaintiff for declaratory relief [C 573830].

B. Defendant's complaint for declaratory relief did not include all the issues in plaintiff's complaint. It included only the policy issues in her insurance policy going to the

constitutionality of the "resident relative" exclusion, the validity of the "waiver" of "uninsured motorist" coverage, and the duty of defendant to provide plaintiff with legal defense when it sued her, its own insured.

C. The insurer's case specifically excluded causes of action in plaintiff's case, for breach of the covenant of good faith and fair dealing, breach of "statutory duty," and breach of fiduciary duties.

1. The insurer vehemently opposed consolidating the two cases on plaintiff's motion.

D. The lower court and the Court of Appeals then affirmed summary judgment for the insurer in the Declaratory Relief case on the policy issues alone, "resident relative exclusion", "waiver of uninsured motorist", etc. [Unpublished Opinion, 3-30-89].

1. On the same day that the Court of Appeals affirmed the insurer's summary judgment on the policy issues, Judge Yaffe, Law and Motion, denied the Insurer's motion for summary judgment in the plaintiff's separate case. He granted the defendant summary adjudication on the policy issues, but denied defendant's summary judgment on plaintiff's right to try the issues of breach of the covenant of good faith and fair dealing, breach of fiduciary duties, etc. See Exhibit [Appendix C, attached hereto-Order of Judge Yaffe, March 30, 1989].

E. Subsequently the Court of Appeals in this case, plaintiff's, declared that the granting of summary judgment to the Insurer in its declaratory relief case was somehow res judicata on all issues in plaintiff's case. This is wrong: the issues of "good faith", fiduciary duty, etc., were not in

the insurer's case, not before the insurer's court and not mentioned in its opinion upholding summary judgment on the policy issues.

1. Judge Yaffe's Order, Exh.C , was never appealed by defendant. It specifically denies summary judgment to the insurer, stating:

"As Defendant points out in its Points and Authorities, the exclusion from coverage of a member of the named insured's family is valid and consistent with both Insurance Code sEc. 11580.1 and public opolicy. [Citations].

"Defendant therefore had no exposure for the injury suffered by Charisse. If she had won her suit against Pederson, Defendant could not have been compelled to pay the judgment. Defendant had therefore no ligitimate interest to protect in that suit and no reason to defend Pederson aginst the claims of its own insured. At the very least, a triable issue exists as to whether Defendant, by acting against the interests of its insured in a lawsuit in which it had no legitimate interests,

violated the duty of good faith and fair dealing that it owed to its insured."

2. The Court [Judge Yaffe] goes on to specifically deny summary adjudication

as to Issue Nos. 7, 8, and 9 "for the same reason that Summary Judgment is denied, i.e., there is a triable issue as to whether defendant breached the insurance contract," etc. Issues 4, and 10 were also denied.

[There was even a conflict between two different courts of appeal as to the duty to defend owed the plaintiff.]

F. The Opinion below, Exh. A hereto, correctly discusses res judicata in regard to the policy issues, but skirts over the issues of "good faith", "fair dealing", etc. which were not in the insurer's case and not res judicata.

1. The lower court correctly states that the insurer had a duty to defend Pedersen, the driver, who was covered by plaintiff's insurance policy, but then it states, "plaintiff fails to explain how such action by defendant, even if unjustified, could injure her right "to

receive the benefits of the agreement." page 17 , Exh. A.

2. The Court deliberately overlooks the fact that the insurer provided Pedersen with two lawfirms, one of which protected him against the County's countersuit, [plaintiff certainly has no objection to this defense], but the other tried to have plaintiff's [its primary insured] entire lawsuit [P.I. in Indio] dismissed.

G. The insurer defendant was defending not only the driver, Pedersen, but taking the part of the other defendant, the County of Riverside, as well, against its own insured. Plaintiff maintains this is a gross example of breach of its fiduciary duty to the insured plaintiff, not to do anything to harm her interests.

Again please see the statements of Judge Yaffe above.

1. Such action indisputably "injures" plaintiff, is not part of the policy, and "injures plaintiff's rights to receive the benefits of her policy." The defendant used her 20 years of premiums to pay its lawyers to have her entire P.I. case thrown out. As stated above, plaintiff certainly never contemplated such use of her policy when she paid the premiums, and she would be better off without any insurance in such a circumstance.

H. The Court of Appeals does not even mention the fact that the defendant provided Pedersen with a defense lawfirm in its Declaratory Relief case, when the insurer sued Pedersen, plaintiff and her mother, all defendants therein. The insurer refused to provide paid legal defense for plaintiff. Remember Pedersen had no insurance of his own, and his coverage is only through plaintiff's

policy.

1. <u>If plaintiff's policy provided him with paid legal defense, why did it not provide plaintiff with legal defense in the Declaratory relief action?</u> Again when plaintiff bought insurance, she never contemplated that her own insurer would sue her, when she has done nothing against it, and is the innocent victim of an auto accident, a passenger, not even the driver, in her own car.

<u>CONCLUSION:</u> Clearly the insurer, by suing in a separate declaratory relief suit, refusing to consolidate, omitting the "bad faith" issues", and receiving summary judgment on just the policy issues, has scored an "end run" around plaintiff. It has managed to have the Appeal Court entirely dismiss her claims and causes of action for bad faith and breach of fiduciary duty, which exist regardless of the legitimacy of the

"resident relative exclusion" or "uninsured motorist" waiver.

II

THE COURT OF APPEALS AND THE CALIFORNIA SUPREME COURT ERR IN STATING THAT PLAINTIFF'S APPEAL IS "FRIVOLOUS", THAT NO "REASONABLE" ATTORNEY WOULD FIND IT WITH MERIT, THAT PLAINTIFF HAS NO SUPPORTING AUTHORITY TO PROVE VIOLATION OF THE COVENANTY OF GOOD FAITH AND FAIR DEALING.

A. Plaintiff respectfully points out that Judge Yaffe, who denied defendant's summary adjudication on the "good faith" claims clearly is a "reasonable attorney" who ruled there are triable issues involving "good faith" and breach of the insurance contract.

B. <u>These issues were not "res judicata" as held by Judge Yaffe, and were not adjudicated previously and never appealed previously.</u> Judge Yaffe had the

order of the lower Court [Hon. M. Vogel] in the insurer's Declaratory relief action, granting summary judgment before him when he ruled. The ruling of the Court of Appeals came down the same day affirming that decision, which did not conflict with the Order of Judge Yaffe, because the "good faith" issues were not involved in that lawsuit, only in plaintiff's case.

III

ALSO PLAINTIFF WISHES TO EMPHASIZE THAT THE LACK OF FAIR PLAY IN THE REASONING OF THE COURT OF APPEALS, THAT THE DUE PROCESS VIOLATIONS IMPOSED BY THE "DOOMSDAY" ORDER AT PLAINTIFF'S "TRIAL" DON'T MATTER BECAUSE PLAINTIFF WASN'T ENTITLED TO A TRIAL ANYWAY.

A. The fact is that plaintiff did have a "trial" and that the manner in which that trial was conducted violated her constitutional rights. Sanctions,

defendant's costs, have been imposed against her for "losing" that trial. This was a trial she could not win. How can any plaintiff meet their burden of proof without exhibits, witnesse, pleadings, jury instructions, etc.?

B. Again please recall that the insurer was also subject to the doomsday sanctions because it too failed to meet and agree on jury instructions prior to the Issues Conference. The difference is, that in applying the "doomsday" order, the insurer is rewarded for such violation. The case is "handed" to the defendant without its having to present any proof or defense to plaintiffs' claims whatsoever. (See discussion below.)

Please remember that plaintiff is an unemployed cosmotologist who has lost her profession because of the physical damages of this accident. Sanctions of $1,000 and costs against her are heavy

and unfair. In this case plaintiff is sanctioned three times. First she lost her case, which means she cannot recover the damages for which she sued originally. Then she was "sanctioned" by having to pay "loser's costs" for a trial which she could not win, and to top it off, she was then again sanctioned by the Court of Appeals, another $1,000 for appealing.

C. While the insurer, who caused her initial damages [Judge Yaffe held the insurer had no business being in the P.I. case to start with, having nothing at risk], and who also was allegedly "sanctioned" along with plaintiff for failure to comply with the Fast Track rules [did not prepare jury instructions, exhibit lists, etc.] is "handed" a free "win", and without having to defend at trial, gets the "winner's costs", plus $1,000 penalty on plaintiffs in the

Appeal Court to boot.

Again, where is the basic fairness, even-handed treatment, equal protection under the law?

IV

THE FAST TRACK RULES ARE VIOLATIVE OF THE CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION IN THE MANNER IN WHICH THEY ARE APPLIED IN THE CALIFORNIA SUPERIOR COURTS.

A. The Trial Court Delay Reduction Act of 1986 was passed by the California Legislature to grant courts, in designated counties, wide procedural latitude in developing their own rules in order to reduce litigation delays that in some counties had reached "scandalous proportions." Laborers' Internat. Union of North America v. El Dorado Landscape Co. (1989) 208 Cal.App.3d 993, 1001, 256 Cal. Rptr. 632.

B. The Act, Gov. Code sec. 68600 et

seq., supported by C.C.P. Sec. 575.1, [enabling legislation authorizing promulation of local rules by superior courts] may permit a wide variety of sanctions against parties and attorneys for noncompliance, including dismissal. It had two competing policies: (1) the reduction of delay in lititgation and the expeditious and timely resolution of cases, and (2) the resolution of cases on their merits rather than dismissal on procedural grounds. Youngworth v. Stark (1991) 232 Cal.App.3d 395,

C. A study of the relevant cases indicates that the Courts have tended to vere more and more to the side of "reduction of delay" through imposition of heavy sanctions for procedural faults, rather than resolution of cases "on the merits".

D. The Caifornia Courts at first held that the Fast Track rules could not

overrule competing existing rules of the California Code of Civil Procedure. Then this proviso was modified: In Cooks v. Superior Court (1990) 224 Cal.App.3d 723 274 Cal. Rptr. 113, the trial court denied a defendant's demand for jury trial due to defense counsel's failure to submit proposed jury instructions within the period required by L. A. County's local fast track rules adopted pursuant to Code of Civil Procedure section 575.1 and the TCDRA.

1. The Court of Appeal issued a writ of mandate directing the trial court to vacate its order striking defendant's jury request and to set the matter for jury trial. Cooks held that C.C.P. sec. 575.2 applied to fast track actions and precluded the denial of the defendant's constitutional right to a jury trial (Cal. Const., art. I, sec. 16) solely on the failure of defendant's attorney to

comply with local fast track rules.

2. Recently however in Intel Corp. v. USAIR, Inc. (1991) 228 Cal.App.3d 1559 [279 Cal. Rptr. 569, the same Court of Appeal that decided Cooks ruled that C.C.P. section 575.2 is inapplicable to fast track cases, and that dismissal based solely on counsel's failure to comply with local fast track rules is authorized by section 68609, subdiv. (d).

3. The Intel Corp. court dealt with its prior decision in Cooks in a footnote:

"In Cooks v. Superior Court (1990) [citation], this court held that it was an abuse of discretion for a trial court to strike a party's request for a jury trial as a sanction for counsel's failure to submit proposed jury instructins at the time prescribed by the L.A. County fast track rules. Nothing in that opinion should be understood to contradict the holding we reach in this case."

Thus the Courts exercised the utmost discretion even though it conflicted with State Statutes.

G. However most cases which have

dealt with the issue, compliance with Fast Track rules v. constitutuional right to jury trial, have ultimately rested their decision to impose heavy sanctions on repeated failures of plaintiffs and their attorneys to comply with local rules and or court orders, i.e., failure to timely file answers, to appear at scheduled status conferences.

1. The Courts have concluded that "sanctions less severe than dismissal would be ineffective to obtain appellants' counsel's compliance with the local fast track rules."

H. Now the California courts have assumed the power to impose sanctions which not only conflict with the California statutes, but with the federal Constitutional rights.

The instant case is an example of the exercise of such sanctions that goes "over-board". Plaintiff's counsel has

diligently pursued this case, prior to this, never had any sanction whatsoever.

Here the one time she did not prepare jury instructions, she had a legitimate reason, she was the sole practitioner, the sole attorney in a four week federal case, and without co-counsel or any legal aide, could not get together with opposing insurer's counsel to prepare said instructions. Further the insurer failed to return the phone calls she made to arrange a stipulated continuance.

1. Further plaintiff herself had nothing to do with this problem, which solely involved her counsel, she too was involved in the federal case, attempting to enforce violations of civil rights. Yet she has been penalized by losing her entire case because of her attorney's inability to prepare said instructions.

I. With her limited assets, plaintiff is an unemployed cosmotologist,

plaintiff couldn't get any other lawyer to take her case to start with. Because she had to rely on a sole practitioner without any support from a law firm, through no fault of her own, she has lost her entire case and has to pay triple damages as well. [See above].

It is obvious that the manner in which these Fast Track Rules are being applied discriminates against poor litigants and sole practitioners.

Plaintiff respectfully requests that this Court review the history and application of these Fast Track rules and declare that as applied, they are unconstitutional.

V

THE TRIAL COURT ERRED IN APPLYING A "DOOMSDAY" ORDER TO PLAINTIFF WHICH DEPRIVED HER OF HER CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO HAVE A HEARING ON THE MERITS BEFORE TAKING PROPERTY FROM HER.

A. Because plaintiff's attorney could not get together with defendant prior to the Issues Conference, the Court imposed a "doomsday" order [sanction] upon plaintiff. [The insurer did not return plaintiff's phone calls twice during this period. Plaintiff was involved in a federal trial with her counsel, who is a sole practitioner and had limited time to "meet" with defendant.]

B. Plaintiff maintains that it was a violation of plaintiff's constitutional rights for the Court to grant plaintiff a jury trial [which she paid for] and then

to prohibit her from presenting witnesses, exhibits, and jury instructions. Defendant alleges that no jury was required because the facts did not give rise to any cause of action, and there was nothing to settle except issues of law. This is directly contradicted by the order of the trial court, Judge Yaffe, [C.T. 1008-1010], ruling that there were multiple triable issues.

C. The order which sanctioned plaintiff also sanctioned defendant for the same omission. But although defendant participated in the same conduct and was subject to the same sanction, because the burden of proof was upon plaintiff, in effect the Court issued a "doomsday" order, which caused the "trial" to become a "sham". Plaintiff could present no witnesses, no evidence, no exhibits, and no pleadings. She was prevented from proving her case, while defendant won

without having to present any defense or answer to plaintiff's claims. Thus the Court rewarded defendant for the same conduct it punished plaintiff for.

D. The trial court, upheld by the Court of Appeal, impaired plaintiff's constitutional right to a jury trial by the "doomsday" order. "Doomsday" sanctions are authorized only "where it appears less severe sanctions would be ineffective, after taking into account the effect of previous sanctions or previous lack of compliance." Gov. Code Sections 68608(b). In the instant case, there was no previous lack of compliance. Plaintiff had pursued the case with extreme diligence, and had never been sanctioned before in this case or any other. The Court went overboard, and the severity of the sanction was totally unjustified.

1. "Violation of local rules

does not justify sanctions that would impair a party's constitutional right to a jury trial." Cooks v. Superior Court (1990) 224 Cal.App.3d 723, 274 Cal. Rptr. 113, holding that it is improper to strike a jury demand because of counsel's failure to submit proposed jury instructions within time required by local rule.

E. In a further violation of plaintiff's due process rights, the trial court granted "costs" to defendant, further rewarding it, for having "won", while preventing plaintiff from winning by not allowing her to present and prove her case. Thus plaintiff was deprived of property without any noticed hearing on the matter.

1. After prohibiting plaintiff from presenting any evidence to prove her case, how can the trial court award "costs" to defendant, who was also

considered subject to the "doomsday" order? Why this uneven treatment in favor of defendant? How can plaintiff be held for costs of a "trial" which was a "sham", which she was not permitted to win? Where is the basic fairness here?

2. It is important to remember that defendant insurer sued plaintiff, its own insured, who had done it no wrong, who was the innocent victim of an auto accident, for declaratory relief. Why should plaintiff pay costs of such litigation?

F. In yet another act of bias and violation of plaintiff's rights to equal protection, the trial court allowed defendant to file a pleading, a motion for judgment on the pleadings, whereas plaintiff was prohibited from presenting any pleadings to prove her case at trial. Appellant's Reply Appendix, Reporter's Trial Transcript, Friday,

February 16, 1990, p. 44, line 2:

THE COURT:" . . . the tenor of Judge Schoettler's ruling in effect forbade any evidence either by documents, such as a deposition, for example, or by live witneses."

MS. MCGEE: Or even pleadings?

THE COURT: That's right. That's a document. So that there may well not be a question for the--for a jury to determine in this case because of Judge Schoettler's order."

1. Plaintiff asked to be allowed to read into evidence the pleadings, the amended complaint, etc., and the trial Court refused. After the above ruling that the "pleadings" were out, how can said court rule in favor of defendant insurer and grant "judgment on the pleadings", the same pleadings plaintiff could not use? Where is the basic fairness here?

VI

THE CALIFORNIA SUPREME COURT WRONGLY AFFIRMED THE RULING OF THE TRIAL COURT AND IGNORED THE CONFLICTS BETWEEN THE SUPERIOR COURT JUDGES AND APPEALS COURTS RE DUTY TO DEFEND.

A. The California Supreme Court affirmed the trial court's dismissal of plaintiff's case, its granting of "judgment on the pleadings", and the sanctions granted by the Court of Appeal, which went further, granting defendant "sanctions" against plaintiff for making a "frivolous" appeal in the amount of $1,000.

1. The Appeal Courts ignored the above conflicts between the rulings of two superior court judges, one who granted the defendant summary judgment and one in this case [Judge Yaffe] who did not.

2. Can the Appeals Court assume

that the order of Judge Jaffe, which held that there were many triable issues and that the defendant had harmed its insured, plaintiff , is not valid?

3. Thus the Court of Appeals ignored the denial of summary judgment by Judge Yaffe, and accepted [and largely copied] the order in the Insurer's Declaratory relief case, again buying the false argument of the insurer that its case had identical issues with plaintiff's. A totally different argument from its position on plaintiff's motion to consolidate the two cases.

4. Was it "frivolous" or "unreasonable" for plaintiff to appeal the order ignoring Judge Yaffe's order, which the insurer never challenged before any Court of Appeal?

B. Is it "frivolous" or "unreasonable" to appeal the order of the Fourth District Court of Appeal, deciding

that the insurer had a duty to defend, which is contrary to the order of the Second District, holding that there was no duty to defend, a conflict between two different Courts of Appeal?

C. At the issues conference, the Court denied defendant the right to make other pre-trial motions. Yet Judge Deering, the trial court, allowed defendant such a pre-trial motion. The trial court violated the order stating no further pre-trial motions. [Defendant did not make a motion in limine, but presented a written brief on the day of trial.]

1. Is it "frivolous" or "unreasonable" for plaintiff to appeal the order of the trial court?

D. The court refused to allow plaintiff to use the "pleadings" but allowed defendant to make a motion at "trial", "judgment on the pleadings".

1. Is it "frivolous" or "unreasonable" for plaintiff to appeal such an order? Where is the basic fairness here?

F. The trial court granted "costs" to defendant as a "winner", while preventing plaintiff from presenting her case, so she could prove it. Is it "frivolous" to appeal such an order?

G. Plaintiffs have a right to an appeal on new issues never before appealed. In re Marriage of Flaherty (1982) 31 Cal.3d 637, 183 Cal. Rptr. 508, cited Anders v. California (1967) 386 U.S. 738, that an appeal is not frivolous if "any of the legal points [are] arguable on the merits." In the instant case the legal points denied by the trial court without evidence or trial are very significant, i.e., contract of adhesion, etc.

1. Plaintiff brought up many

new issues, "doomsday" sanctions, breach of contract, bad faith, etc. There was no prior Court of Appeals' order on these issues which were before the trial court. See Appellant's Reply Appendix.

H. How can a $1,000 fine at the Appellate level be fair against a plaintiff who seeks only to recover her damages which were caused by the actions of a defendant whom the lower court itself has said harmed plaintiff and had no business acting as it did against her interests?

I. The imposition of this fine is a violation of plaintiff's due process rights and the taking of property without notice in that plaintiff had no prior written notice of the amount of the sanction, the supporting argument, or any supporting documentation for said amount? Plaintiff was only informed less than a week prior to the Appeals hearing by

letter from the clerk of the Court of Appeals, giving no amount or other information.

1. When defendant's attorney was asked at the appeals hearing how much he wanted in sanctions, he replied that he did not know, and that he had no supporting documentation. The appeals court then insisted on an "estimate", which he made, $1,000, which was accepted without supporting documentation. The amount of said sanction is excessive to an unemployed cosmetologist, who indisputably had no "improper motive", i.e., to delay or harass, and who sought to enforce her constitutional rights.

2. Further defendant sued plaintiff, its insured, for declaratory relief. It had no costs of legal research in plaintiff's case. This is an attempt to make plaintiff pay for the insurer's own legal research in its own case.

E. In re Marriage of Flaherty, supra, held that "the power to impose punishment for prosecution of frivolous appeals should not be used except in the clearest of cases. . .An appeal should be held to be frivolous only when it is prosecuted for an improper motive, that is, to harass the respondent or delay the effect of an adverse judgment, or when it indisputably has no merit. Frivolousness should be narrowly construed to avoid a chillilng effect on the assertion of rights and attorneys should be sanctioned only for the most egretious conduct. ." 31 Cal.3d at 650-651.

CONCLUSION: This case is replete with constitutional violations. Perhaps the most "chilling" is the willingness of the Court of Appeal to impose sanctions without due process and still worse, to disregard the violations of plaintiff's constitutional rights in the trial court,

by arguing that somehow it is alright because plaintiff was not entitled to a trial anyway, so there is no harm done.

Based on the above, plaintiff respectfully asks this Supreme Court to reverse the order of the California Supreme Court and Appeal Court, to set aside the sanctions imposed against plaintiff, and to order the Superior Court to hold a jury trial on the merits of plaintiff's claims as to unconstitutionality of the "resident relative" exclusion and the manner in which it was applied to this plaintiff, and other issues raised by Judge Yaffe's order, and the issue of "contract of adhesion".

RESPECTFULLY SUBMITTED,

February 10, 1992,

June McGee

JUNE MCGEE, ATTORNEY FOR PETITIONER

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FOUR

L. CHARISSE MCGEE,	) B048712
	) S.C.N. C536820
Plaintiff and Appellant,	)
	)
vs.	)
	)
INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA,	)
	)
Defendant & Respondent.	)
	)

COURT OF APPEAL-SECOND DIST.
F I L E D JUL 24 L991
ROBERT N. WILSON, CLERK

APPEAL from a judgment of the Superior Court of Los Angeles County, Warren H. Deering, Judge. AFfirmed.

June McGee for Plaintiff and Appellant.

Gilbert, Kelly, Crowley & Jennett, Clifford H. Woosly, Peter J. Godfrey, and Gregtg T. Lenahan for Defendant and Respondent.

Plaintiff L. Charisse McGee appeals from a judgment rendered in favor of defendant Interinsurance Exchange of the Automobile Club of Southern California on the pleadings in her action seeking declaratory relief and damages. Plaintiff contends (1) the "resident relative exclusion" in the automobile insurance policy issued by defendant to plaintiff is unconstitutional, (2) the waiver of uninsured motorist coverage in that policy was invalid, (3) defendant had a duty to provide plaintiff with legal counsel, (4) defendant breached the covenant of good faith and fair dealing implied in the insurance contract, and (5) the court erred in barring both

parties from calling witnesses, introducing exhibits, and proposing jury instructions, and in denying plaintiff's request for a jury trial. Additionally, each party requests that sanctions be imposed aginst the opposing party. For the reasons that follow, we affirm the judgment and impose sanctions on plaintiff, payable to defendant, for bringing a frivolous appeal.

PROCEDURAL AND FACTUAL HISTORY 1/

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1. Portions of the following factual statement are taken from the unpublished opinion of Division One of this court in Interinsurance Exchange of the Automobile Club of Southern California v. McGee (3-30-89) B033480 (Super. Ct. L.A. County, No. C573830) and the published opinion of the Fourth Appellate District, Division Two, in McGee v. Superior Court (1985) 176 Cal.App.3d 221 (Super. Ct. Riverside County, 158917), both of which are related actions involving the same parties.

A-4 Shortly after midnight on March 1, 1983, plaintiff was involved in an automobile accident near Thousand Palms in Riverside County while a passenger in a vehicle owned by her and driven by her friend Byron H. Pedersen. When Pedersen failed to negotiate a curve, the vehicle struck a stump by the side of the road and rolled over several times. Plaintiff was thrown through the windshield and seriously injured; Pedersen suffered minor injuries.

Plaintiff's automobile was ininsured under a policy issued by defendant to plaintiff's mother, June McGee, initially in 1963. In 1973, plaintiff's mother executed an endorsement waiving uninsured motorist coverage; at that time, plaintiff was 12 years of age When plaintiff reached the age of majority, she purchased her automobile, and the vehicle was insured under her mother's

policy. Defendant did not inform plaintiff she was subject to the waiver or ask her for a separate waiver of uninsured motorist coverage.

In 1977, plaintiff's mother graduated from law school. At that time, she asserts, she asked her insurance agent to obtain a new insurance policy with increased liability coverage and with uninsured motorist coverage restored. Instead, the old policy was renewed with increased liability coverage and no uninsured motorist coverage. Plaintiff alleged that the higher premiums for the increased liability coverage concealed from her mother the omission of uninsured motorist coverage from the policy.

Part I of the insurance policy covers liability for bodily injury and property damage. One section thereof is entitled "WHAT IS NOT COVERED--EXCLUSIONS--PART I." It reads, in pertinent part: "Under

Part I, this policy does not apply to: . .(f) liabililty for bodily injury to you, a relative or any person insured under this part. . ."

On September 22, 1983, plaintiff sued Riverside County for damages (Super. Ct. Riverside County, No. 158917). The county filed a cross-complaint against Pedersen. On February 29, 1984, plaintiff also sued Pedersen. Defendant provided Pedersen with defense counsel in both cases, which later were consolidated. The defense provided was subject to a reservation of rights based on a claim of noncoverage under the policy, however. The record before us does not reveal the outcome of these consolidated cases.

On March 1, 1985, plaintiff filed the present action (Super. Ct. L.A. County, No. C 536820) against defendant. As subsequently amended, the complaint

sought declaratory relief of her rights under the insurance policy and damages for breach of contract, breach of the covenant of good faith and fair dealing, breach of "statutory duty," and breach of fiduciary duties.

On November 7, 1985, defendant sued plaintiff, plaintiff's mother, and Pedersen, seeking a declaration it was not liable under the policy for plaintiff's bodily injury and had no obligatioin to defend Pedersen (Super. Ct. L.A. County, No. C 573830). It based its claim of noncoverage on the exclusion in the liability portion of the policy and on the waiver of uninsured motorist coverage.2/ The trial court granted motions for summary judgment, ruling that defendant had no duty to defend Pedersen and that plaintiff's bodily injury was not covered under the liability or uninsured motorist portions of the

policy.

Plaintiff and her mother appealed from the ensuing judgment. In an unpublished opinion filed March 30, 1989, Division One of this court affirmed the summary judgment, ruling (1) the "family exclusion clause" of the insurance policy (a) is not unconstitutional, and (b) is not ambiguous or unclear; (2) plaintiff is not entitled to uninsured motorist benefits under the policy; and (3) defendant has no duty to defend Pedersen.

On March 30, 1989, the same day Division One issued its opinion in case Number C 573830, the trial court denied a motion for summary judgment brought by defendant in the present case but granted, in part, defendant's motion for summary adjudication of issues. [Judge Yaffe]

By order filed November 2, 1989, the present case was set for jury trial on

January 2, 1990. On December 27, 1989, the trial court issued an order stating: "Neither party filed

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2. On February 14, 1986, plaintiff filed a motion for consolidation of case numbers C 536820 and C 573830. Defendant opposed the motion, which was denied on June 30, 1986.

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or exchanged witness lists or exchanged exhibit lists or jury instructions--therefore neither side to be permitted to introduce exhibits, witnesses nor jury instructiions." Plaintiff petitioned this court for a writ of mandate to vacate that order, and on January 31, 1990, the petition was denied by Division One.

The case was called for trial on February 16, 1990. The trial court denied plaintiff's motion for relief from the order prohibiting her from calling witnesses, introducing exhibits, or

submitting jury instructions. Defendant brought motions for judgment on the pleadings, directed verdict, and nonsuit, which the court took under submission following argument.

On February 26, 1990, the trial court issued an order which reviewed the status of the case, including the December 27, 1989, order banning either party from calling witnesses or introducing exhibits at trial, and found there were "no admissions of defendant that would . . .support any [of plaintiff's] cause[s] of action." The court granted judgment on the pleadings for defendant on all of plaintiff's causes of action and granted defendant's motions for nonsuit and a directed verdict. On April 12, 1990, judgment for defendant was entered.

DISCUSSION

I

PLAINTIFF IS PROHIBITED BY THE

DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL FROM LITIGATING ISSUES PREVIOUSLY DETERMINED BY FINAL JUDGMENT.

Defendant asserts that the judgment must be affirmed based on the principles of res judicata and collateral estoppel. "The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction [Citation.] `Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.' [Citation.] The applicatiion of the doctrine in a given case depends upon an affirmative answer to these three questions: (1) Was the issue decided in the prior adjudicatin identical with the one presented in the action in question? (2)

Was there been a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudicatin? [Citations.]" (Levy v. Cohen (1977) 19 Cal.3d 165, 171.)3/

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3. Code of civil Procedure section 1908 provides: (a) The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, . . .having jurisdiction to pronounce the judgment or order, is as follows:. . .[par.(2)]. . .the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity. . ."

In the present case, plaintiff was a party to the action for declaratory relief filed by defendant (Super. Ct. L.A. County, No. C 573830), and there was a final judgment on the merits of the prior action which was affirmed by Division One of this court. The

remaining question to be addressed is whether the issues presented in the case before us were decided in the prior action.

Plaintiff's contentions that the "resident relative exclusion" provision in the automobile insurance policy which defendant issued to plaintiff is unconstitutional, and that the waiver of uninsured motorist coverage was invalid, expressly were determined against plaintiff in the prior judgment. Further, Division One of this court held, in affirming that judgment, that defendant had no obligtion to defend Pedersen because defendant's duty to defend was limited to "any suit claiming damages for bodily injury. . .if covered by [the] policy" and plaintiff's damages for bodily injury are not covered by the policy. This determination that plaintifff's damages are not covered by

the policy likewise disposes of plaintiff's contention in the present action that defendant had a duty to provide plaintiff with legal counsel.

The circumstance that plaintiff filed the present action before defendant filed its action is of no consequence. "Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue res judicata in the other court. [Citations.]" (Domestic & Foreign Pet. Co. Ltd., v. Lona (1935) 4 Cal.2d 547, 562.)

II

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT ON THE PLEADINGS FOR DEFENDANT

The sole issue remaining, following the foregoing application of the doctrines of res judicata and collateral

estoppel, is whether defendant breached its duty to plaintiff of good faith and fair dealing by defending Pedersen in the suit filed by plaintiff against Pedersen. The judgment on the pleadings in favor of defendant disposed of this issue.

In reviewing a judgment on the pleadings, an appellate court must confine itself to the pleadings which are the subject of the motion, and all facts alleged in the pleadings must be accepted as true. (April Enterprises, Inc. v. KTTV (1983) 147 Cal.App.3d 805, 815; 6 Witkin, Cal. Procedure (3d. 1985) Proceedings Without Trial, Sec. 263, pp. 564-565.) Even if it appears likely the defendant would prevail at a trial, the motion should not be granted if the facts alleged constitute a cause of action. (Schwartz v. Schwartz (1946) 74 Cal.App.2d 711, 713.)

"`There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.' [citation.]" (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 684.) The complaint in the present case alleged that defendant provided Pedersen with legal counsel in plaintiff's action against Pedersen despite plaintiff's demand that defendant not do so.

The court in McGee v. Superior Court, supra, 176 Cal.App.3d 221, 225, reviewing a related action involving the present parties, recognized that "in view of [plaintiff]'s allegation that Pedersen was driving [plaintiff]'s automobile with her permission, [defendant] had both the right and duty to [provide Pedersen with counsel] unless it flatly asserted

noncoverage and refused to provide the defense." Plaintiff has cited no authority, and we are aware of none, that holds that an insurance company breaches the implied covenant of good faith and fair dealing by providing counsel to a permissive driver pursuant to the terms of the policy. (See Travelers Ins. Co. v. Norwich Union Fire Ins. Soc. (1963) 221 Cal.App.2d 150, 152.) Plaintiff fails to explain how such action by defendant, even if unjustified, could injure her right "`to receive the benefits of the agreement.' ["citation.] (Foley v. Interactive Data Corp., supra, 47 Cal.3d 654, 684.)

We need not, and do not, address plaintiff's contentions that the trial court erred in prohibiting her from calling witnesses, introducing exhibits, or submitting jury instructions at trial, and in denying plaintiff's requst for a

jury trial, because plaintiff suffered no prejudice as a result of these rulings. All of plaintiff's contentions were resolved against her prior to trial, as discussed above, either by application of the doctrines of res judicata and collateral estoppel or by the judgment on the pleadings rendered in favor of defendant.

III

SANCTIONS ARE IMPOSED AGAINST PLAINTIFF FOR THE FILING OF A FRIVOLOUS APPEAL

Defendant in its brief requests sanctions for the filing of a frivolous appeal. In compliance with the requirements of the decision in In re Marriage of Flaherty (1982) 31 Cal.3d 637, 654, the clerk of this court notified counsel by letter to be prepared to address that subject during oral argument. In response, plaintiff by

letter requests that sanctions be imposed against defendant.

"[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (In re Marriage of Flaherty, supra, 31 cal.3d 637, 650; Code of Civ. Proc., sec. 907; Cal. Rules of Court, rule 26(a).)

To a great extent, the present appeal raised issues that previously had been determined adversely to Oplaintiff by a final judgment. (See Maple Properties v. Harris (1984) 158 Cal.App.3d 997, 1008-1009.) although this is not true of plaintiff's contention that defendant violated the covenant of good faith and

fair dealing implied in the insurance contract, plaintiff failed to support this contention with citation to any supporting authority. We conclude, therefore, that the present appeal indisputably has no merit and impose against plaintiff sanctions in the amount of one thousand dollars ($1,000.00) payable to defendant. We deny plaintiff's request that sanctions be imposed against defendant.

DISPOSITION

The judgment is affirmed. Defendant shall recover from plaintiff its costs on appeal. In additiion, plaintiff is ordered to pay to defendant sanctions in the amount of one thousand dollars ($1,000.00) for bringing a frivolous appeal.

NOT FOR PUBLICATION IN THE OFFICIAL REPORTS

GEORGE, J.

We concur: WOODS, (Arleigh), P.J.

GOERTZEN, J.

App. B

Second Appellate District, Division Four, No. B048712;

S022741

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CHARISSE MCGEE, Appellant

v.

INTERINSURANCE EXCHANGE OF AUTO CLUB OF SO. CALIF., Respondent.

Appellant's petition for review DENIED. George, J. did not participate.

SUPREME COURT
FILED
NOV. 13, 1991
ROBERT WANDRUFF CLERK

[Signed] LUCAS

Chief Justice

App. C-1

FILED MAR 30, 1989
FRANK S. ZOLIN, COURT CLERK
[SIGNED]

SUPERIOR COURT OF THE STATE OF CALIFORNA

FOR THE COUNTY OF LOS ANGELES

CHARISSE MCGEE,	) Case No. C536820
Plaintiff,	) ORDER DENYING MOTION
	) FOR SUMMARY JUDGMENT
VS.	) AND PARTIALLY
	) GRANTING AND
INTERINSURANCE	) PARTIALLY DENYING
EXCHANGE OF THE	) MOTION FOR SUMMARY
AUTOMOBILE CLUB OF	) ADJUDICATION OF
SOUTHERN CALIF.,	) ISSUES
DEFENDANTS.	)

Defendant's Motion for Summary Judgment or, in the alternative, for Summary Adjudication of Issues, came on for hearing on March 13, 1989, P.J. Godfrey of the firm of Gilbert, Kelly, Crowley & Jennett, appearing as attorney for Defendant and Moving Party, and June McGee, appearing as attorney for Plaintiff and Responding Party. The Court, having read and considered the

written submissions of the parties, and having heard oral argument, continued the matter to March 27, 1989, for the purpose of permitting the parties to submit additional Points and Authorities. The Court, having read and considered the additional submissions of the parties, and being fully advised, ORDERS, ADJUDGES AND DECREES:

1. The Motion for Summary Judgment is denied.

Defendant had a duty to defend Pederson against a claim for injuries suffered by Charisse, unless such risk was expressly and unambiguously excluded by the terms of the policy. State Farm v. Jacober, 10 Cal.3d 193, 200 (1973). But Exclusion (f) of the policy does clearly and expressly exclude any injury to Charisse from coverage. California State Auto Association v. Warwick, 17 Cal.3d 190 (1976).

As defendant points out in its Points and Authorities, the exclusion from coverage of a member of the named insured's family is valid and consistent with both Insurance Code Sec. 11580.1 and public policy. Farmers Insuance Exch. v. Cocking, 29 Cal.3d 383 (1981); c.f., Farmers Ins. Exch. v. Teachers Ins. Co., 101 Cal.App.3d 804, 809 (1980).

Defendant therefore had no exposure for the injury suffered by Charisse. If she had won her suit against Pederson, Defendant could not have been compelled to pay the judgment. Defendant had therefore no legitimate interest to protect in that suit and no reason to defend Pederson against the claims of its own insured. At the very least, a triable issue exists as to whether Defendant, by acting against the interests of its insured in a lawsuit in which it had no legitimate interests, violated the duty

of good faith and fair dealing that it owed to its insured.

2. Summary Adjudication is granted as to Issues Nos. 1, 2, 3, 5, 6, and 11, there being no substantial controversy as to those issues.

3. Summary Adjudication is denied as to Issue No. 4, because Par. 2 of the Declaration of June McGee raises a triable issue as to whether Plaintiff intended to waive uninsured motorist coverage for only the next ensuing policy period or for all ensuing policy periods.

4. Summary Adjudication is denied as to Issue Nos. 7, 8 and 9 for the same reason that Summary Judgment is denied, i.e., there is a triable issue as to whether Defendant breached the insurance contract.

5. Summary Adjudication is denied as to Issue No. 10, because it is not factually supported by Defendant and

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Moving Party.

DATD: March 30, 1989

DAVID P. YAFFE

Judge of the Superior Court.

PROOF OF SERVICE

PETITION FOR CERTIORARI, CHARISSE MCGEE, PLAINTIFF-PETITIONER, V. INTERINSURANCE EXCHANGE OF THE AUTO CLUB, OF So. Cal.; RESPONDENT· CHARISSE MCGEE V. INTERINSURANCE EXCHANGE OF THE AUTO CLUB OF SO. CALIFORNIA. S022741, B 048712 C 536820.

JUNE MCGEE, on oath deposes and states that on the 20th day of February, 1992, three copies of the Petition for a Writ of Certiorari were served by first class mail, postage prepaid, on the following persons:

GILBERT, KELLY, CROWLEY & JENNET, 1200 Wilshire Blvd., 6th Floor, Los Angeles, California 90017; (213) 580-7000;

Superior Court, Dept. 40. Judge Ret. , 111 S. Hill St., L.A., Calif. 90012;

Supreme Court of California, 300

South Spring Street, L.A., CA 90013;

Court of Appeal, Second District, 300 South Spring Street, L.A., CA 90013;

Superior Court of L.A. County, 111 No. Hill Street, L.A., CA 90012.

All parties required to be served have been served.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: February 10, 1992,

June McGee

JUNE MCGEE, ATTORNEY FOR PETITIONER